paid to the plaintiff a sum of $2,565 and he consequently on 7th September 1965 gave judgment for the plaintiff in the sum of $585 and costs and nothing was said or mentioned at all about the defendant's counterclaim or about the other two issues which the parties had agreed to be tried. There was no appeal against that order of the learned president.

Clause 8(e) of the agreement (Exhibit A1) stipulated for payments of fourteen monthly instalments of $250 each. The plaintiff had included in his claim in the sessions court monies which were due to him up to 2nd August 1962. The claim included only two of the fourteen monthly instalments which the defendant had agreed to pay. The present claim of the plaintiff is in respect of the balance of the twelve monthly instalments totalling $3,000. The defendant has now raised the plea of *res judicata* and at the trial of this suit the following preliminary issue was framed: "Is the claim of the plaintiff in the present suit barred by *res judicata*?" Mr. Shunmugam, counsel for the defendant, very rightly at the end of the arguments submitted that if the defendant's plea of *res judicata* failed, there should be judgment for the plaintiff as prayed as there was no other plea sustainable on behalf of the defendant.

The law of *res judicata* was contained in section 6 of the former F.M.S. Civil Procedure Code. It finds no place in our present Rules of the Supreme Court. I do not know why.

In order to render a prior decision conclusive in a subsequent suit it must appear from the record of the former suit that the particular matter sought to be concluded was necessarily determined. "*Res judicata*" said Lord Romilly in *Jenkins* v. *Robertson*,[1]

"by its very words means a matter upon which the court has exercised its judicial mind and has come to the conclusion that one side is right and has pronounced a decision accordingly. In my opinion *res judicata* signifies that the court has, after argument and consideration, come to a decision on a contested matter."

It must be shown that the matter was heard and finally decided.

In this particular case it cannot be said that the question of the payment of the twelve instalments due from the defendant was ever before the learned president. The parties were never heard on that. The principle of *res judicata* can only apply if there is an identity of issue to be tried and the issue has already been decided on merits in the previous proceedings There can be no *res judicata* regarding a cause of action that has arisen subsequently to the previous suit. The essential requirement for the application of the principle of *res judicata* is that the actual issues in the two suits must be identical. Where the question at issue is not the same in the two proceedings the principle of *res judicata* does not apply. The question at issue in Malacca Sessions Court Civil Action No. 49 of 1962 was whether the defendant had paid to the plaintiff at the time of the institution of that action a sum of $2,565 or $2,085. That issue had nothing to do with the plaintiff's claim in the present suit.

The leading case on the subject is the *Duchess of Kingston's*[2] case and the following classic passage from the judgment of Sir William de Grey is a statement of the leading principles of *res judicata*:

"From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: first that judgment of a court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or as evidence conclusive, between the same parties, upon the same matter, directly in question in another court; secondly that the judgment of a court of exclusive jurisdiction, directly on the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court, for a different purpose. But neither the judgment of a court of concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment."

The president of the sessions court was not competent to try the present suit and on that ground also the plea of *res judicata* cannot succeed.

To constitute a matter *res judicata* the following conditions must be fulfilled:

1. The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue either actually or constructively in the former suit.
2. The former suit must have been a suit between the same parties or between parties under whom they or any of them claim.
3. The parties as aforesaid must have litigated under the same title in the former suit.
4. The court which decided the former suit must have been a court competent to try the subsequent suit or the suit in which such issue is subsequently raised.
5. The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the first suit.

I am of the view that there is no merit whatsoever in the plea of *res judicata* raised by the defendant. There will thus be judgment for the plaintiff in the sum of $3,000 and costs.

Judgment for the plaintiff.

Solicitors: *T. Thalayasingam & Co.; S. Shunmugam.*

MALACCA MALAY GURU2 CO-OPERATIVE THRIFT & LOAN SOCIETY LTD. v. TAN MEI HUA & ORS.

[O.C.J. (Sharma J.) October 16, 1970]

[Malacca — Civil Suit No. 54 of 1967]

Practice and Procedure — Execution — Writ of seizure and sale — Plaintiffs having no right to issue writ of seizure and sale against defendants — Application to set aside writ of seizure and sale — Inherent right of court to make restitution.

The plaintiffs had obtained judgment against the defendants and it was ordered that the plaintiffs do recover from the first defendant double rent at the rate of $1,000 per month. The third defendants had taken an interpleader

summons to determine whether they should pay the rents to the plaintiffs or the first defendant. An order was made on the interpleader summons wherein it was ordered that the rents payable by the third defendants to the first defendant be paid into court pending settlement of the issue between the plaintiffs and the first defendant in the civil suit. The plaintiffs took out a writ of seizure and sale against the third defendants for recovery of $5,600 alleging that these were the arrears due from July 1968 to August 1969. The third defendants paid the amount under protest and applied to the court to set aside the writ.

Held: in the circumstances the plaintiffs had no right to issue the writ of seizure and sale against the third defendants and the writ of seizure and sale must therefore be set aside and the plaintiffs ordered to refund the sum of $5,600 paid by the third defendants under protest, with interest.

Cases referred to:-

(1) *Tyne* v. *Butler* (1854) 23 L.J. Ch. 504.

(2) *Scott* v. *Uxbridge & Rickmansworth Rly. Co.* (1866) L.R. 1 C.P. 596 at pp. 598, 599.

(3) *Rodger* v. *Comptori D'Escompte de Paris* (1871) 40 L.J.P.C. 1; 24 L.T. 111.

(4) *Jai Berhm* v. *Kedar Nath Marwari* 49 I.A. 351; A.I.R. 1922 P.C. 269.

(5) *Prayag Narain* v. *Kamekhea* 36 I.A. 97.

(6) *Lala Bhagwan Das* v. *Lala Kishen Das*, [1953] S.C.R. 559.

CIVIL SUIT.

D. A. Devadason for the plaintiffs.

M. Shankar for the third defendants.

Cur. Adv. Vult.

Sharma J.: This is an application by the third defendants, Bata Shoe Co. (Malaya) Ltd., to set aside the writ of seizure and sale issued on the 28th day of October 1969 at the instance of the plaintiffs.

The facts, as taken from the pleadings and the judgment of Ibrahim J., briefly are that by an agreement in writing dated 6th July 1960 the plaintiffs let certain premises to one Koh Cheng Jim at a monthly rental of $500. Koh Cheng Jim sub-let separate portions of these premises to the second, third and fourth defendants respectively. Koh Cheng Jim was adjudged a bankrupt on 16th January 1967 but he had earlier in February 1966 fraudulently, as held by Ibrahim J., assigned the tenancy of the premises to his wife, the first defendant. The plaintiffs duly terminated the tenancy of Koh Cheng Jim by a notice to quit dated the 14th December 1966. The attitude of the Assistant Official Assignee was that he had no concern whatsoever with the premises as the bankrupt had already prior to his adjudication assigned his interest in the tenancy. The plaintiffs brought this suit for possession and damages. The fourth defendant submitted to judgment on 22nd June 1967 and as far as the first three defendants are concerned they were held to be trespassers by the learned judge who heard the suit and that part of the order (Enclosure 157) dated 29th August 1969 which concerns the present application is in the following terms: —

"And it is ordered that the plaintiffs do recover from the first defendant and the first defendant do pay to the plaintiffs double rent at the rate of $1,000 per month from the 1st of February 1967 to the date of delivery up of the aforesaid premises less any amount that may have been deposited in court by the third defendants (which is ordered to be paid to the plaintiffs) and the rents which the fourth defendant would have paid to the plaintiffs."

The third defendants had earlier on 13th July 1967 taken out an interpleader summons (Enclosure 45) to determine whether the third defendants should pay the rent to the plaintiffs or the first defendant. In the affidavit in support of the interpleader summons the sales manager of the third defendants said that the third defendants had not only paid to Koh Cheng Jim three months' rent by way of deposit but also rent in advance for three years. There was no denial of these averments in the affidavit filed by the first defendant. It should consequently be accepted that the third defendants had in fact paid a deposit equivalent to three months' rent and had further paid three years' rent in advance to Koh Cheng Jim (See *Tyne* v. *Butler*(1)). An order was made on the interpleader summons on 25th August 1967 and the material part of it reads as follows:

"It is ordered that the rents payable by the third defendants to the first defendant be paid into court pending settlement of the issue between the plaintiffs and the first defendant in the Civil Suit." (the underlining is mine).

Judgment in the suit was delivered on 29th August 1969 and the relevant part of the final order is as follows:

"And it is ordered that... the first defendant do pay the plaintiffs double rent at the rate of $1,000.00 per month from the first day of February 1967 to the date of delivery up of the aforesaid premises less any amount that may have been deposited in court by the third defendants (which is ordered to be paid to the plaintiffs) and the rents which the 4th defendant would have paid to the plaintiffs."

The plaintiffs on 28th October 1969 took out a writ of seizure and sale against the third defendants for recovery of $5,600 alleging that those were the arrears of rent due from July 1968 to August 1969.

The third defendants had already paid the rent up to June 1967 and pursuant to the order made on the interpleader summons on 25th August 1967 had paid into court a total sum of $6,800 representing rent for 17 months. The plaintiffs' solicitors took this money out of court. The third defendants contend that under an agreement with Koh Cheng Jim no rent was payable by them for the period 1st October 1968 to 30th September 1971 because of the payment in advance of three years' rent which was expressly earmarked for this particular period under that agreement. Exhibit JV I annexed to the affidavit of Mr. Varmuza makes this abundantly plain. The third defendants had thus by an error paid into court the rents for the months of October and November 1968 (See Exhibit D12).

Execution is the formal method prescribed by law whereby the party entitled to the benefit of a judgment or any obligation equivalent to judgment may obtain that benefit. A party is entitled to execute the order of the court according to the tenor and content of that order. The right to execute is available only against those against whom the order is enforceable and such right is limited to the extent specified in the order. A person may be a party to a suit but if no order is made against him he is not liable to the process of execution. The plaintiffs could under the order of the court dated the 29th August 1969 (Enclosure 157) execute only

against the first defendant for recovery of double rent at the rate of $1,000 per month from 1st February 1967. This order limited the amount which could be recovered by the plaintiffs from the first defendant by expressly specifying that the amounts which "may have been deposited in court by the third defendant" were to be deducted from the amount which may otherwise have been due from the first defendant under that order. This order does not direct any payment by the third defendants to the plaintiffs. It only stipulates that the amount already paid by the third defendants into court should be paid out to the plaintiffs. The plaintiffs could consequently not issue any execution against the third defendants on the strength of that order (except for costs with which we are not concerned in this application). The only order upon which the plaintiffs could possibly proceed against the third defendants was the order dated 25th August 1967 (Enclosure 80) on the interpleader summons. That order only required the third defendants to pay *"rents payable"* into court *"pending settlement of the issue between the plaintiff and the first defendant."* The plaintiffs could not issue a writ of seizure and sale for the enforcement of that order. Their proper remedy in case there was any breach or disobedience of that order by the third defendants was to apply for enforcement of that order by a writ of attachment (Order 42 r. 4). In this case, however, I am satisfied that no rent was payable by the third defendants for three years after September 1968. They had in fact by error paid into court rents for the months of October and November 1968. The third defendants were ordered to pay into court the *rents* payable by them, *i.e.*, payable at the date of that order (Enclosure 80) or which were to become payable thereafter pending the settlement of the issue. Those sums of money which were ordered to be paid into court were payable only as rent and they were payable only when due as rent. If no rent was due no payment was to be made.

When the writ of seizure and sale was issued and presented to the third defendants they paid the sum of $5,600 under protest to the bailiff of the court who had gone to seize their goods. The sum of $5,600 was subsequently paid by the court to the plaintiffs' solicitors. In the case of *Scott* v. *Uxbridge and Rickmansworth Railway Co.*[2] Erle C.J. said:

"Now I am clearly of opinion that the shareholder being called on in these legal proceedings to pay the debt that is claimed from him, has a right to stop these legal proceedings by payment, and the payment is just as valid when made under protest as when made without protest. The shareholder has a right to say: 'I will stop the proceedings by paying the money, but I protest it is more than I am bound to pay; and by putting in that protest he preserves to himself recourse to any just right which the law gives him."

In the same case Willes J. said:

"The question is one of general importance, whether a debtor tendering an amount which he is satisfied to pay rather than be sued for it, may guard himself against an admission that the claim is a just one, so as to put himself in a position to take further proceedings to test the justice of the claim, by adding the words 'under protest' to his tender, and tendering under protest. It is quite obvious that he may. I think that the protest imposes no conditions on the tender. The creditor has only to say, 'I take the money; protest as much as you please,' and neither party makes any admission. Whereas if the debtor were not allowed to use some such expression on paying the money, there would be from his silence an implied admission that the claim on him was a just one."

In the case of *Rodger* v. *Comptori D'Escompte de Paris*[3] Lord Cairns observed:

"One of the first and highest duties of all courts is to take care that the act of the court does no injury to the suitors and when the expression 'the act of the court' is used it does not merely mean the act of the primary court or of any intermediate Court of Appeal but the act of the court as a whole from the lowest court which entertains jurisdiction over the matter to the highest court which finally disposes of the case."

The jurisdiction to make restitution is inherent in every court and is exercised whenever the justice of the case demands it. (See *Jai Berhm* v. *Kedar Nath Marwari*,[4] *Prayag Narain* v. *Kamekhea*[5].) In *Lala Bhagwan Das* v. *Lala Kishen Das*[6] the Supreme Court of India put the matter thus:

"On the reversal of a judgment, the law raises an obligation on the party to the record who received the benefit of the erroneous judgment to make restitution to the other party for what he had lost and that it is the duty of the court to enforce that obligation unless it is shown that restitution would be purely contrary to the real justice of the case."

The underlying principle is that when the main judgment or order is varied or reversed, all orders consequential or depending upon it are affected and wrongs done under them have to be righted by granting restitution. In order to do this the court may make any order including an order for the refund of costs or the payment of interest, damages, compensation or *mesne* profits as may properly be consequential on such variation or reversal of the order.

In view of what I have already said and in the light of the facts and the orders of the court dated 25th August 1967 and 29th August 1969 the plaintiffs had no right to issue the writ of seizure and sale against the third defendants. The writ of seizure and sale is consequently set aside. The third defendants are also entitled to be restored to *status quo ante* in consequence of the setting aside of the writ of seizure and sale and the plaintiffs are ordered to repay the sum of $5,600 to the third defendants. In the case of *Rodger* v. *Comptori D'Escompte de Paris*[3] already cited, their Lordships of the Privy Council observed that

"the perfect judicial determination, which it must be the object of all courts to arrive at, will not have been arrived at unless the persons who have had their money improperly taken from them have the money restored to them with interest during the time that the money has been withheld."

Interest is payable not only up to the date of the application for restitution but also up to the date of realisation. The plaintiffs have had the benefit of $5,600 belonging to the third defendants. The benefit is represented not only by that sum alone but also by the amount of interest which it carries with it. The plaintiffs will therefore also pay to the third defendants interest at the rate of 6% per annum from 3rd November 1969 (that was the date on which the third defendants paid the cheque for $5,600 to the bailiff of the court) to the date of payment. The third defendants will also have the costs of the application.

I understand that the order made on 29th August 1969 by the learned trial judge has on appeal been set aside. When the Federal Court allowed the appeal of

the third defendants the writ of seizure and sale in fact automatically stood set aside and the third defendants then became immediately entitled to get back the sum of $5,600 from the plaintiffs. In fact, in view of the judgment of the Federal Court, it was not necessary for me at all to go into all the reasoning or the merits of the application made before me by the third defendants.

Order accordingly.

Solicitors: *D. A. Devadason; Shearn, Delamore & Co.*

PORT SWETTENHAM AUTHORITY v. SHARIKAT LEE HENG SDN. BHD.

[A.C.J. (Abdul Hamid J.) October 21, 1970]

[Kuala Lumpur — Civil Appeal No. 4 of 1970]

Bailment — Liability of port authority as bailee — Loss of goods — Res ipsa loquitur — Burden of proof — Port Swettenham Authority By-Laws, 1965, r. 91(1).

Port Authority — Bailment — Liability as bailee — Port Swettenham Authority By-Laws, 1965, r. 91(1).

This was an appeal against the judgment of the learned magistrate ordering the appellant to pay a sum of $936 in respect of a claim by the respondents. The respondent's claim was in respect of the value of one case of locksets lost while in the custody and possession of the appellants. The learned magistrate held that as the appellant was a bailee, mere proof of loss by respondent was sufficient by invoking the doctrine *res ipsa loquitur* to show that the appellant was negligent thus placing the burden upon the appellant to show absence of negligence on its part.

Held, allowing the appeal: (1) it is clear from the language of rule 91(1) of the Port Authority By-Laws that in exercising its statutory functions with regard to the storage of goods, the authority is not liable for loss of goods in its custody unless actual fault is established;

(2) the burden of proof in this case therefore, unlike the position at common law, is cast upon the respondents and as they had failed to discharge this burden of proof, judgment should have been given against them.

Cases referred to:-

(1) *Morris* v. *C.W. Martin* [1965] 2 All E.R. 725 at p. 731.

(2) *Abdul Rahman* v. *Ariffin* [1956] M.L.J. 89.

(3) *Gee Hup & Co.* v. *Chop Yong Pee Huat* [1935] M.L.J. 66.

(4) *J. Spurling Ltd.* v. *Bradshaw* [1956] 2 All E.R. 121 at p. 125.

(5) *Canada Steamship Lines Ltd.* v. *The King* [1952] A.C. 192 at p. 208.

(6) *H.C. Smith Ltd.* v. *Great Western Rly Co.* [1922] 1 A.C. 178.

(7) *Harris* v. *Great Western Rly. Co.* (1876) 1 Q.B.D. 515.

(8) *Gibund* v. *Great Eastern Rly. Co.* [1921] 2 K.B. 426.

(9) *Turner* v. *Civil Service Supply Association Ltd.* [1926] 1 K.B. 50.

CIVIL APPEAL.

Abdullah bin Yusoff for the appellant.

P. Cumaraswamy for the respondents.

Abdul Hamid J.: This was an appeal against the judgment of the learned magistrate of Kuala Lumpur ordering the appellant to pay a sum of $936 with interest at 6% and costs in respect of the claim made by the respondents.

The respondents, Sharikat Lee Heng Sdn. Bhd on 14th November, 1969 issued a summons in the magistrate's court, Kuala Lumpur, against the appellant, Port Swettenham Authority, to recover a sum of $936 being the value of one case containing 180 pieces of locksets lost while in the custody and possession of the appellant. The respondents were the consignees of goods namely four cases of locksets shipped and loaded *ex* s.s. "*Myrmidon*" at Liverpool, United Kingdom for Kuala Lumpur via Port Swettenham. The four cases of locksets were discharged from the ship and kept in the custody of the appellant at the warehouse for delivery to the respondents. When the respondents called at the port to take delivery, only three cases were delivered. One case was lost and could not be traced.

The respondents alleged that the said one case was lost as a result of negligence of the appellant or their servants or agents and also relied on the doctrine of *res ipsa loquitur.*

The appellant in its defence denied receiving four cases and further sought the protection under rule 91(1) of the Port Swettenham Authority By-Laws, 1965

On the evidence the learned magistrate quite rightly concluded that the four cases of locksets were delivered to the custody of the appellant. The only ground which requires consideration is whether the learned magistrate was right in holding that mere proof of loss by the plaintiffs/respondents was sufficient, by invoking the doctrine of *res ipsa loquitor,* to show that the appellant was negligent placing thereby the burden upon the appellant to show absence of negligence on its part.

Mr. Cumaraswamy, counsel for the respondents, submitted that the appellant was a bailee for reward and that the common law rule with regard to a claim by a bailor from a bailee under a contract of bailment applies. He cited the case of *Morris* v. *C. W. Martin*[1] where Lord Denning M.R. said —

"(iii) *Bailment for reward.* Once a man has taken charge of goods as a bailee for reward, it is his duty to take reasonable care to keep them safe: and he cannot escape that duty by delegating it to his servant. If the goods are lost or damaged, whilst they are in his possession, he is liable unless he can show, that the loss or damage occurred without any neglect or default or misconduct of himself or of any of his servants or agents to whom he delegated his duty."

He then referred to the case of *Abdul Rahman* v. *Ariffin*[2] where Thomson J. (as he then was) found nothing inconsistent between the common law principle and sections 104 and 106 of the Contracts (Malay States) Ordinance, 1950. And referring to the case of *Gee Hup & Co.* v. *Chop Yong Pee Huat*[3] it is submitted that the Court of Appeal held that it was not necessary for the bailor to prove *prima facie* negligence even though he had pleaded negligence. Mr. Cumaraswamy also drew my attention to the case of *J. Spurling* v. *Bradshaw*[4] where Denning L.J. (as he then was) said —

"A bailor, by pleading and presenting his case properly, can always put the burden of proof on the bailee. In the case